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The Publicness of Private Land Use Controls

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Real burdens, or land-use "servitudes" as they are called in the United States, are usually thought of as strictly private legal devices. Yet in many countries, including the United States, they serve public functions. They are used to constitute residential community associations. These institutions differ from traditional civil society institutions in that they are designed to provide public goods in much the same way as cities do. Generally, they allocate public goods more efficiently than do local governments, which are unable to respond to differences in preferences for various goods and services within given political boundaries. At the same time, however, the very fact that residential community associations perform many of the same public functions as municipalities creates certain tensions between these associations and the neighbouring municipalities. A fair and equitable resolution of these tensions requires that residential community associations be characterised as quasi-public for the purpose of legal regulation. To date, that view has been impeded by the fact that they are created through private land-use controls. For residential community associations to fulfill their potential to reinvigorate both civil society and the public sphere, they must be viewed for legal purposes as quasi-public, owing certain obligations to the society outside their boundaries.

A. INTRODUCTION

Forms of actions are not the only legal phenomenon which rules us from the grave.[1] Decades after the American Legal Realists effectively demolished the idea that public law and private law are categorically distinct from each other, the public–private distinction is still very much with us, on both sides of the Atlantic. The distinction's continuing vitality is evident in several arenas, but one in which it has played a particularly important role in recent American legal thought is the law of land-use

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1 The allusion is, of course, to F W Maitland, *The Forms of Action at Common Law*, eds A H Chaytor and W J Whittaker (1936), at 1: "The forms of action we have buried, but they still rule us from our [*sic*] graves."

servitudes, a term that includes what Scottish lawyers call "real burdens" as well as servitudes. In that context the public–private distinction has been used in the United States as the basis for a contractarian, or "non-interventionist" as it is often called, model of land-use controls. There are two versions of this contractarian model, one (relatively) weak, the other strong. The strong version is that public planning law is both illegitimate and unnecessary given the existence of servitude law as the private-ordering alternative. The weak version opposes all but the most minimal role of judicial supervision of land-use controls. This article provides reasons for rejecting both versions.

The method followed will be indirect. Rather than considering the contractarian model on its own terms and strictly in reference to legal doctrine—an enterprise already undertaken by the present writer and others—this article will examine the concrete social and political implications of the contractarian model. It will make two main claims here, one analytical, the other normative. The analytical claim is that the seemingly technical and arcane world of the law of land-use servitudes is best understood and evaluated as a crucial mechanism for the constitution of a relatively novel institution of civil society, the residential association. That is, the most important function of servitudes in modern industrialised Western societies is to create the residential association as a relatively new institutional form within civil society, a "public" sort of civil society institution. The normative claim is that the characteristics of residential associations as this type of civil society institution not only justify but require an ongoing supervisory role for legal institutions over these residential groups. The purpose is not to support solidarity or discipline within the groups, but to prevent residential groups from undermining the very function of civil society *vis-à-vis* the public sphere. Once the close relationship between land-use servitudes and civil society is understood, then it should be clear why the vision of servitude law as strictly private, a matter to be left solely to market forces, is both incoherent and dangerous.

This survey, like Gaul, is divided into three parts. The first briefly describes the reigning private, or contractarian, understanding of servitudes. The second and third parts then develop two points regarding the relationship between servitudes and civil society. There will, however, be no argument either for the wholesale abolition of servitudes or, less grandly, for any particular forms of legal supervision of servitudes. As the Scottish Law Commission's Discussion Paper on Real Burdens[2] cogently maintains, and as will be made clear later, servitudes usefully fill in many gaps in land-use regulation that formal public law neither does nor can effectively fill. The question is not servitudes, yes or no; neither is it legal intervention in private ordering, yes or no. The question for law-makers thinking about land-use planning law is,

2 Scot Law Com Disc Paper No 106, 1998.

rather, what type of society democratic polities want to constitute for the future, given the social forces that will characterise that future, among them, global economic and political integration, large-scale migration of people from South to North, and continuing urbanisation.

B. THE CONTRACTARIAN MODEL OF SERVITUDE LAW

Both versions of the contractarian model of land-use controls rely on a strong interpretation of the principle of freedom of contract. For libertarian-minded commentators, that principle resolves the fundamental normative dilemma facing any system of legal control of land use: the legitimacy of the exercise of power which such a system inevitably entails. What legitimates the exercise of power through enforcement of servitudes, the argument goes, is the very fact that all of the persons affected by the given servitude have consented to its control. Consent, indeed unanimous consent, is precisely what marks the difference between control through servitudes and control through planning laws. One involves the exercise of power consensually created through contract; the other relies on the ostensibly dubious mechanisms of democratic politics. One is individualist and volitional; the other is collective and coercive. One is private; the other is public.

An influential article by Professor Robert Ellickson, of the Yale Law School, illustrates this view of servitude law.[3] Ellickson argues that existing American legal rules regulating cities, on the one hand, and homeowner associations, on the other, have things exactly backward. American law generally subjects the actions of collective entities like cities to only the most minimal level of legal supervision, requiring only that those actions be "rational", that is, non-arbitrary and non-discriminatory. Judicial review of the internal rules of homeowner associations, by contrast, is strikingly more rigorous, he suggests, for it demands that the rules conform to broader substantive norms. In Ellickson's view, the fundamental distinction between cities and homeowner associations as public and private entities should lead courts and lawmakers to reverse this allocation of power: public planning actions should be subject to stronger legal supervision, while private planning measures should be given much greater deference.

Ellickson, along with other American commentators, conceptualises homeowner associations as private residential governments, the constitution of which consists of an intricate network of servitudes. He argues that the nature of membership in these private governments creates the critical difference between them and public governments. Membership in homeowner associations, he contends, is "perfectly voluntary", while membership in public governmental entities is, at best, imperfectly

3 R Ellickson, "Cities and homeowners associations" (1982) 130 *University of Pennsylvania Law Review* 1519–1588.

voluntary. Precisely because they are more voluntary, homeowner associations should have greater power than they currently do, perhaps even more power than cities. It is worth examining this vision of voluntariness in more detail because it is the linchpin for the entire libertarian project. To do so, we may borrow some jargon popular among American law-and-economics scholars and first coined by the distinguished economist Albert O Hirschman, the concepts of "exit", "voice", and "loyalty"[4] as the possible responses to the management of a given organisation.

Suppose that a city planning board and a homeowner association both impose identical height restrictions on buildings in different residential areas. The city imposes its restriction through a so-called "zoning" measure, while the homeowner association imposes its restriction through the form of a restrictive covenant in its original declaration of covenants, conditions and servitudes. Ellickson argues that the zoning measure raises more serious fairness and efficiency concerns than the covenant does, for unlike the covenant, which was included (or incorporated) in all of the landowners' deeds, there is no unanimity of support for the zoning ordinance, only majority support, and that at best, given the well-known deficiencies in governmental processes. The existence of unanimous support for the covenant means that the total response by members of the homeowner association is loyalty. The same cannot be said for the zoning provision. Membership in the city, acquired through residence, is no guarantee that residents are loyal to, that is, approve of, whatever regulatory decisions city officials make. Residents who disapprove of the zoning decision have only two available strategies, "voice", that is, expression of their disapproval and attempts to change the decision, or "exit", that is, withdrawing from the organisation. Voice is an unlikely strategic response in the public sphere because of the familiar problems with collective action. But exit is not an attractive response either. Exit is at best an imperfect strategy for disgruntled homeowners because the immobility of their asset limits their options. They can convert their land to capital, of course, by selling it, but selling represents capitulating on the very matter at issue: to be able to use *their* land free from the unwanted height restriction. They face, then, a Hobson's choice. To keep the land, they must comply with the restriction (grudging loyalty); to avoid the restriction, they must give their land and their home (exit). Either way, the coercive effects of the public regulation stand in stark contrast, the argument goes, to the developer's uncoerced servitude.

Ellickson's argument represents only a particularly clear example of how contractarian legal policy analysts are wont to favour servitudes as the means of controlling land use by assuming a categorical distinction between choice and coercion, and then locating servitudes in the realm of choice, while relegating zoning,

4 A O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (1970).

as an instance of "public" regulation, to the arena of coercion. The effect, if not the intent, is to create a strong presumption that any form of legal supervision of servitudes is illegitimate because it frustrates private intent.

One way of responding to this mode of thinking about servitudes is to appraise the contractarian model on its own terms. This was the strategy of American Legal Realists, like Robert Lee Hale, who argued that the entire view of private law as strictly facilitative rather than coercive is incoherent. As Duncan Kennedy explains, one of Hale's contributions was to show that the rules of private law are as coercive in their own way as is public law. In the context of private law,

> [t]he state uses force to ensure obedience to the rules of the game of bargaining over a joint product. To the extent that these rules affect the outcome, forcing the parties to settle for x rather than y percent of the joint product, the state is implicated in the outcome. It is an author of the distribution even though that distribution appears to be determined solely by the "voluntary" agreement of the parties.[5]

The gain of this view would be to neutralise the initial advantage of servitudes over planning law as alternative methods of controlling land use. Servitude law would be regarded in a light which makes its name more apt than when it is viewed solely through the lens of contract.

Another strategy would be to point out the various contractual pathologies which often infect servitude arrangements, including problems of notice, misunderstandings of the legal effects of servitudes, changes in individual preferences, and the like. There is a significant body of literature which casts doubt on the claim that servitudes are only rarely beset by these maladies. Subsequent purchasers of land burdened with restrictive servitudes frequently complain that they were not made aware of the existence of the restriction when they bought, or that they did not fully appreciate the legal effects of the provisions to which they assented, or that, while they were initially indifferent to the restrictions, changes of circumstances have made them strongly hostile to them. Of course, complaining about such defects in the bargaining process is one thing; proving them is another. Moreover, one might point out, virtually all types of complex and long-term contracts are vulnerable to such imperfections, yet we do not habitually undo leases, labour agreements, or supply contracts willy-nilly. Both of these points are fair enough, but the disquieting fact remains that there exist, for the United States at least, considerable data indicating a significant degree of frustration and dissatisfaction among residents of housing developments regulated by restrictive covenants.[6]

5 D Kennedy, *Sexy Dressing Etc: Essays on the Power and Politics of Cultural Identity* (1993), 85–86.

6 E J Blakely and M G Snyder, *Fortress America: Gated Communities in the United States* (1997), 21–23.

There is a third basis for questioning the strict "privateness" of land-use servitudes, one that more directly addresses the purposes to which servitudes are put in modern Western societies. The more important deficiency in the contractarian model of servitudes is its failure to focus upon how servitudes today serve as the primary means for residential communities to opt out of public government. The next section argues that examination of how servitude-based residential associations privatise governance only underscores their public character, a character that is obscured if we view servitudes solely through the lens of private ordering.

C. RESIDENTIAL ASSOCIATIONS AS PUBLIC CIVIL SOCIETY

Servitudes do not exist in a social vacuum. Like all other areas of private law, servitude law on the surface appears to be strictly a body of facilitative background rules that neither compel nor forbid any particular social conduct or institutions. Like all other areas of private law, however, beneath the surface servitude law turns out to have profound influence on the type of social order that emerges from ostensibly consensual behaviour. This is especially true with respect to servitudes which are used as the primary regulatory mechanism for residential developments governed by a home-owners', or residential association. This is the type of servitude that the Scottish Law Commission Discussion Paper refers to as "community burdens". As the Paper accurately states, this type of servitude is for the "self-regulation of housing estates, tenements, and other communities where people live in close proximity to one another".[7] In the United States, residential arrangements created by such servitudes have come to be known as "private residential governments",[8] perhaps better known as "residential associations". This use of servitudes merits closer consideration, since in the United States residential associations have proliferated so much in the past quarter century that they may be said, without exaggeration, to represent the twentieth century's single most important contribution to housing. Not only in the United States, but throughout the developed Western world, residential developments regulated by servitudes are becoming increasingly common.

For law reformers, these residential communities pose a challenge that they may not yet fully appreciate. From one perspective, residential associations appear to be only one more institution of civil society, of a piece with the traditional forms of civil society. The political scientist Benjamin Barber nicely captures the conventional understanding of "civil society" when he describes it as "the domain whose middling terms mediate the stark opposition of state and voluntary sectors and offer women

7 Scot Law Com Disc Paper No 106, 1998, para 1.13.

8 For example, J Reichman, "Private residential governments: an introductory survey" (1976) 43 *University of Chicago Law Review* 253–306.

and men a space for activity that is both voluntary and public".[9] Civil society includes all the various institutions that mediate between the state and the individual—labour unions, churches, the family, social and fraternal clubs, and the like.

Both as a social concept and as a social phenomenon, civil society has been around a long time, of course, as anyone familiar with Scottish Enlightenment thought knows. Both Adam Smith and Adam Ferguson elaborated the idea of a sphere of society distinct from the state and governed by its own constitutive and normative principles. For Americans, civil society's high-water mark is commonly thought to be the ante-bellum years of the nineteenth century, when Alexis de Tocqueville's grand tour of America led to his celebrated paean to the benefits of private voluntary associations. "Wherever at the head of some new undertaking you see the government in France, or a man of rank in England," observed Tocqueville, "in the United States you will be sure to find an association."[10]

The past decade has witnessed a considerable revival of interest in civil society, both in Europe and in the United States. In Europe, the revival was sparked by the social movements that led to the fall of socialist states in Central and Eastern Europe. The Solidarity movement in Poland provided a model of the kind of intermediate institution that offered the hope of a democratic alternative to the totalitarian state. (I should add, parenthetically, that this hope for the revival of civil society as the privileged path to democracy and economic prosperity in Central Europe has now largely vanished.) In the United States, those worried about the decline of civic engagement have taken very much to heart Tocqueville's lesson that the strength of citizenship in the public sphere depends on the existence of thriving intermediary institutions. On the surface of things, the remarkable rise of residential associations, created and maintained through private land-use devices, provides reason for optimism about the possibility of civil society regenerating itself. For judges and lawmakers, the central challenge posed by this new institution of civil society is how to determine the appropriate legal relationship between residential groups and the wider polity of which they are a part.

Both the eighteenth-century conception of civil society and that held by the leaders of the modern anti-communist social movements emphasised the separation between the public sphere and the institutions of civil society. The normative draw of both of those conceptions is the promise they hold out for finding a refuge from state oppression. In this respect, viewing residential associations as an institution of civil society would seem to lead in the same direction as the contractarian model of residential associations. Both ways of looking at residential associations, contractarian and civil society, appear to emphasise the privateness of these groups, both in an

9 B Barber, "An American civic forum" (1995) 5(2) *The Good Society* 10.

10 A de Tocqueville, *Democracy in America* (Shocken Books edn, 1961), vol 2, 129.

analytical and in a normative sense. As we have seen, the contractarian model analyses residential associations as constituted by contract and, therefore, presumed to be governed by the norm of freedom of contract. The civil society model, precisely insofar as it stresses the distinction between the state and the institutions of civil society, appears to throw normative weight onto the private, non-statist side of things. From whichever perspective one uses, then, the lesson appears to be to leave residential communities largely to their own devices, to cede to them a high degree of sovereignty over their rules and their own affairs.

Anyone familiar with the history of the idea of civil society will recognise that this conclusion is drawn too quickly. In the historical perspective, there has been a recurrent tug-of-war over civil society. While the eighteenth-century Scottish political economists clearly placed civil society on the private side of the line, stressing the ways in which civil society institutions were distinct from the state, other theorists have tended to assign civil society to the public side. From classical Greek thought through to Kant and Rousseau, civil society was equated with active citizenship, and the political functions of civil society's institutions were always the primary focus of attention.

We need not solve, or even address, this old debate to appreciate good reasons why residential associations, and their core legal device, the servitude or "real burden", should not be treated as strictly private and entitled, therefore, to a high degree of immunity from legal regulation. The institutions of civil society are not all of a piece. They serve a wide variety of functions, and those functions have different consequences for their relationship with the public sphere. Residential associations are not the Boy Scouts. It is possible to think of the Boy Scouts as rather far removed from the public sphere, although its exclusion of women and gays has made it a politically contested institution in recent years. By contrast, it is simply not accurate to think of labour unions as entirely distinct from the public sphere. To the contrary, labour unions, probably more than any other institution of civil society, are inextricably connected with the public sphere in complex ways. Few today would think it appropriate to treat labour unions as purely contractual entities that should enjoy immunity from public supervision and regulation. The suggestion is that residential associations should also be understood as civil society institutions that are quasi-public in character. Indeed, unlike labour unions, residential associations and the public sphere are related in ways that are mutually constitutive.

To a very considerable extent, residential associations are created as a reaction to cities and to public regulation. Residential communities represent an attempt to contract out of cities and other forms of public governance, seceding from the civic sphere and playing strictly by their own rules.[11] In this sense they are a private form

11 For evidence of this trend, see Blakely and Snyder, *Fortress America*.

of suburbs. Just as suburbs develop as a place of escape from cities, so do residential associations. But residential associations signify a more extreme form of escapism from the public sphere, precisely because, unlike suburbs, they are expressly created through legal devices of private ordering. While no suburb could possibly claim immunity from all public regulation, suburbs do claim, and in American law are granted, a relatively high degree of autonomy. Residential associations claim to be entitled to a much stronger form of autonomy, not only by virtue of their privateness, but also to enable them effectively to fulfil their roles as alternative, and perhaps superior, providers of public goods.

Local governments misallocate local public goods for various reasons. One reason is that a locality's boundaries will not always coincide with the ideal geographic area for a particular good or service. The ideal area for security services may be different from the ideal area for water service, for example. A second reason is that the preferences for any given good or service may vary quite widely among all of the residents of a locality. I may prefer much more by way of police services, for example, while you strongly prefer nice golf courses. This indicates that local public goods tend to be only imperfectly pure. While they exhibit some of the non-exclusivity and non-rivalness of pure public goods (or else there would be little reason to provide them through collective means rather than through the market), the extent of these characteristics will vary across the locality. The result is that local governments leave unmet the demand by discrete groups for certain goods while oversupplying other goods to other groups. Even if the discrete subgroups are able to organise themselves effectively in an attempt to correct these misallocations, legal requirements of equality of treatment of all residents prevent local governments from acting in the kind of selective fashion that would be necessary.

This is just where residential associations step in. Through the private form of a residential association, a discrete group of individuals having similar preferences can get together and pay for the goods or services that they prefer but cannot obtain from a local government. The result, moreover, is not only beneficial to these individuals but also to the majority of residents in the locality, since the subgroup will not now be seeking to divert public funds to satisfy their idiosyncratic preferences. The combination of public and private government facilitates a much better match of supply and demand of local public goods than public government alone can achieve.

Another benign effect of a dual system of local governance is the fact that covenants permit individuals to discriminate, both positively and negatively, on the basis of lifestyles. If I am strongly attracted to Spanish-style architecture, for example, I may not only want my house to have that style but my neighbours' houses as well. Conversely, if you are repelled by Spanish-style architecture (or indeed by the existence of any such plan of uniformity), restrictive covenants are a signal to you to avoid living in my community. Now, this signalling function can go too far, of course.

In the United States, until the middle of this century, restrictive covenants were widely used to maintain racial homogeneity. No-one, not even the strongest proponents of the contractarian model, argues that such forms of discrimination should be permitted, however "private" they might appear to be. But there seems to be little if any basis for objecting on public policy grounds to covenants that restrict on the basis of aesthetic features such architectural style, or colour, or even size of dwellings. Such discrimination is simply a by-product of the fact that people have different tastes and want to associate with others who share their own tastes.

That, in brief, is the case for a dual system of public and private governance of residential life, public governance through the familiar devices of taxation and regulation, and private governance through networks of consensually-created land-use servitudes. It is a powerful case, sufficiently so to justify the complexity of maintaining any such dualistic approach to the provision of goods and services.

The rise of residential associations, then, is basically the story of political decentralisation. Viewed that way, the phenomenon appears rather benign. To quote one commentator, decentralisation "allows individuals with common preferences to gravitate to a common location where they can pursue their conception of the good life".[12] It is clear that decentralisation of political power has many benefits. Among these are more efficient provision of collective goods, enhanced opportunities for self-government, increased likelihood that individuals will take advantage of such opportunities to affect the condition of their own lives, and greater room for experimentation (in part because the costs of failed experiments are lower).[13]

But that is hardly the end of the story. The emergence of private alternatives to local governments has negative spillover effects, or, in the vernacular of economics, "externalities", as well as positive effects. The most obvious of these is the likely fact that the well-off will isolate themselves in residential associations where they pay for just the services and goods that they desire, and resist public funding of the same services, thereby affecting, not only themselves, but outsiders as well. For example, residents of a residential association who desire a high level of police protection will pay for private security services through servitudes for the payment of annual fees. They are likely then to resist significant public spending on police, regarding that as a form of double taxation. Now, public and private funding of collective goods is not inevitably a zero-sum situation. We are all aware of situations in which this turns out not to be the case. People often pay for private schools without lobbying to reduce taxes for public education, for example. It is not only

12 C P Gillette, "Courts, covenants, and communities" (1994) 61 *University of Chicago Law Review* 1375–1441.

13 See generally J Frug, "Administrative democracy" (1990) 40 *University of Toronto Law Journal* 559–605; G E Frug, "The city as a legal concept" (1980) 93 *Harvard Law Review* 1057–1154 at 1067–1073.

altruism or civic-mindedness that leads them to do so, but recognition of the fact that the future well-being of themselves and their children depends on the existence of a well-educated general population. Never the less, some degree of trade-off between public and private spending should be expected, and in fact occurs.

A second spillover effect which residential associations have on local governments is that the funding for the goods and services provided by residential associations is seldom purely private. Typically, all or more of the basic infrastructure of residential associations—streets, fire hydrants, street lighting, and the like—are installed at public expense. Even in the rare cases where these basic goods have been privately financed, residents of residential associations still depend on public utilities for electricity, water, gas, and telephone services. Privatisation can be taken only so far. No man is an island, and neither is any residential association. Private residential governments are inevitably dependent on the public sector for their very existence.

Residential associations have external effects on the public sphere in a third and more profound sense. Precisely because restrictive covenants are designed to discriminate in some way and to achieve some form of homogeneity, they inevitably cause exclusion. The homogeneity that covenants create in residential associations will consequently affect the identity of the locality outside of the association's boundaries. If no residential association excluded poor people through single-family residential use restrictions, size and reset-back requirements and the like, for example, the character of cities would be different. This is just one of many illustrations of the fact that residential associations and municipalities are mutually constitutive.[14]

In summary, it has so far been argued that residential associations, created through land-use servitudes, can meaningfully be said to be "public" entities within civil societies in at least three respects. First, and most obviously, they are public to the extent that they provide their members with goods and/or services that are normally, or traditionally, provided by local governments. These include police and fire protection, streets and other thoroughfares, and shared recreational spaces such as parks, walks, lakes, and the like. Second, they are public, not simply because the goods or services they provide have conventionally been thought of as public, but because their provision of these services affects and is affected by the level of funding from public entities such as cities and public utilities. Third, they are public in the sense that their character, or identity, is mutually interdependent with that of neighbouring municipalities.

A more general way of expressing the basic thrust of all three of these points is to say that in the context of residential associations, the main purpose of servitudes is to set boundaries, and "the setting of boundaries is always a political act".[15]

14 Here we follow J Frug's analysis in "Decentering decentralization" (1993) 60 *University of Chicago Law Review* 253–338 at 279–294.

15 Blakely and Snyder, *Fortress America*.

D. THE SOCIAL OBLIGATION OF RESIDENTIAL ASSOCIATIONS

The fundamental question addressed in the third part is, what implications does this analysis of residential associations as a public institution of civil society have for the issue of legal regulation? Putting the question in more distinctively legal terms, when servitudes adopted by residential associations to regulate their members' own behaviour conflict with wider social norms, how should the conflict be resolved? To make the discussion more concrete, two examples may be considered.

Suppose that covenants in a particular residential subdivision prohibit the use of buildings "for business or commercial purposes of any kind", and restrict the use of lots within the subdivision to "single-family dwellings". A local agency, implementing a legislatively recognised policy of de-institutionalising retarded persons, leases a house and lot within the subdivision to house and care for eight unrelated retarded adults. The residential association contends that this group home violates the restrictive covenants, and seeks to enjoin continuation of the lease.

Now, it is possible to side-step any conflict between the internal preferences of the association with broader social norms through the process of construction of the covenants' language. A group home for retarded persons might quite plausibly be seen as a non-commercial use, avoiding a violation of the first covenant, and, with at least some plausibility, as the functional equivalent of a single-family dwelling to the extent that the eight residents live and function as a single social unit. Or the single-family covenant might be construed as a structural, rather than a use restriction. Suppose, though, that the covenant is more sharply drawn, explicitly prohibiting sale or leasing to anyone for purposes of establishing a group home for developmentally disabled persons. Now the conflict is clear and cannot be side-stepped through imaginative interpretation. The residential association argues that the norms of free association, free contract, and local autonomy require that it be able to pursue its vision of the good, while the agency contends that the broader social value of fully including the disabled within social life trumps the association's internal values. How should the conflict be resolved?

To make the question more difficult, let us assume that there exists no public law, no statute or ordinance that invalidates such restrictive covenants against group homes, regardless of the date of the covenant's creation. The existence of such a law would seem to provide sure grounds for concluding that the legislature has declared the matter one of public policy that pre-empts contrary private preferences. (I should note, however, that at least one American court has held to the contrary, ruling that such a statute violates the state's constitutional clause prohibiting the impairment of contracts.[16]) If it is correct that a primary motivation in the use of servitudes to

16 See *Clem* v *Christole Inc* 582 NE 2d 780 (Ind 1991).

create restrictive residential associations is to opt out of one or more burdens imposed by the public sphere, then we should expect such cases to occur with some frequency. And they have, at least in the United States.

From the conception of residential associations as a public institution of civil society described earlier, it follows that the most fruitful way to begin resolving such conflicts is by defining the relationship between the residential group or association and the public polity of which it is a part. Recognition of the interdependence between the residential association and neighbouring cities might lead a court to conclude that the association's decision to exclude the group home cannot be justified on the basis of its residents' preferences alone. Its impact on its neighbours requires that it take into account their welfare as well as its own. One American court has adopted this approach in the context of suburban exclusionary zoning. The court stated that "when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognised".[17] Just as the court in that case reasoned that the interdependence between city and suburb required that each look beyond its own boundaries in assessing the impact of its "local" decisions, so one might argue that residential associations, as quasi-public institutions that are dependent upon and in turn affect other localities, have obligations to those localities. On this basis, a covenant prohibiting group homes within a residential association might be held to be unreasonable where its impact would seriously impair the public policy of integrating the developmentally disabled into the rest of society, and where the group home's use would in all other respects be consistent with the character of the area. As one writer has observed, "[o]ne can only meaningfully speak of the type of people that live in a certain area because at the same time implicit reference is made to all those people who *do not* live there".[18] On this view, the basis for holding exclusionary servitudes of this sort to be unreasonable is not altruism or sympathy, but a failure to fulfil obligations that result from interdependency.

This approach may appear to some to be too drastic a departure from the usual assumptions about the character of servitudes and the residential associations that they create. Servitudes, one might wish to say, are, after all, devices of *private* ordering, unlike zoning, and residential associations are, after all, private institutions, unlike suburbs. But that response begs the question. It is clear that not every servitude will be enforced merely by virtue of its private character. A servitude that expressly prohibits sale or leasing of property to members of particular racial groups would not be sustained, despite its private character. The inability of private groups to use private land-use devices in ways that discriminate on the basis of race is a clear

17 *Southern Burlington County NAACP* v *Township of Mt Laurel* 336 A 2d 713 (NJ 1975), at 726.

18 G H Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* (1991), 188.

example of our recognition of the fact that private groups owe legal obligations to outsiders. Once this point is admitted, then it is just a question of degree because the pretence of a categorical, binary distinction between public and private land-use regulation has been dropped.

The second example takes an issue which also has been raised recently in the United States. A residential association near Los Angeles adopted a servitude prohibiting within the development the distribution of any newspaper other than its own in-house newspaper. The court held that this servitude was unreasonable.[19] The court observed that the effect of the servitude was to turn the association's residents into a captive audience for the in-house newspaper. Having allowed the distribution of one publication, the association could not then engage in viewpoint discrimination by disallowing the distribution of others.

Suppose, though, that the association had banned the distribution of all newspapers within the development. Would the lack of viewpoint discrimination make the servitude less objectionable? The explanation as to why such a restrictive servitude is objectionable and should not be judicially enforceable requires re-emphasis of the role of residential associations, indeed of any self-governing community, as an institution of civil society. Both the modern proponents of a robust civil society and their predecessors in the Scottish Enlightenment recognised that civil society is vital to the success of any democracy. Both of these schools of thought regarded the institutions of civil society as breeding grounds for citizens. It is in the context of the social interaction of these institutions that individuals learned *how* to practise effective citizenship. They acquire both sociability and a deeper understanding of the broader society of which they are a part. What Tocqueville called the "schools for citizenship", and Burke "the little platoons" of civil society, teach respect for others, self-restraint, reflexive deliberation, and the coherence of the idea of common weal. Those characteristics of what in an older vocabulary was called "virtue" obviously cannot be learned or acquired in environments of self-imposed isolation from outsiders. But that is precisely the effect of a servitude that prohibits the distribution of newspapers. The response that many other avenues of access to the news remain available to residents is not adequate. For one thing, many would claim that newspapers are a superior form of news to the alternatives—television, radio, and even the Internet. More fundamentally, the whole idea of a residential community that has banned newspapers from its premises seems anathema to the idea of such institutions as participants in civil society. To be sure, one cannot force a public to read or to become informed, but one can certainly maximise the prospects for a well-informed public by prohibiting barriers to entry that can be justified only on the basis of a thin aesthetic argument against clutter.

19 *Laguna Publishing Co* v *Golden Rain Foundation* 182 Cal Rptr 813 (Ct App 1982).

This example, like the first, illustrates the need for judicial scrutiny of servitudes that impair the public function of residential associations. In the United States, courts have scrutinised residential association covenants under the rubric of a requirement of "reasonableness". That requirement, however, generally only requires that covenants be reasonably related to the association's own internal purposes and goals. In only a few cases have courts gone on to scrutinise the legitimacy of the purposes themselves. In short, most American courts have applied the reasonableness requirement in a way that effectively adopts the contractarian understanding of residential associations.

The central weakness of that approach is to ignore the social function of these institutions. An approach that was mindful of the relationship between residential associations and civil society would require that the association's covenants should not violate its obligations to the public institutions with which it is interdependent. Such an approach could be implemented under a "reasonableness" standard, with "reasonableness" here being explicitly defined in terms of the association's social obligations.

E. CONCLUSION

The approach sketched here is not intended to replace private land-use controls with public regulation. The need to maintain a dual system of land-use regulation is unquestionable. The fundamental question is how to understand the relationship between the two systems. That, in turn, requires a deeper understanding of the relationship between the public and private spheres generally. The relationship which this approach contemplates is perhaps best and most succinctly captured in a recent article by the American philosopher John Rawls. Describing what he calls "political liberalism", Rawls states:

> [W]hen political liberalism distinguishes between political justice that applies to the basic structure and other conceptions of justice that apply to various associations within that structure, it does not regard the political and the non-political domains as two separate, disconnected spaces, each governed by its own distinct principles.... A domain so-called, or a sphere of life, is not ... something already given apart from political conceptions of justice. A domain is not a kind of space, or place, but rather simply the result, or upshot, of how the principles of political justice are applied, directly to the basic structure and indirectly to the associations within it.... If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing.[20]

20 J Rawls, "The idea of public reason revisited" (1997) 64 *University of Chicago Law Review* 765–807 at 791.